Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-165–05 OF 2016
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
14 FEBRUARY 2017

Civil Procedure — Judicial review — Appeal against — Respondent dismissed appellant from his employment — Trial court dismissed appellant's application for judicial review to quash decision of respondent — Whether appellant was denied right of appeal to Public Services Disciplinary Board — Whether appellant was denied right to oral hearing — Whether appellant not supplied with documents used against him

Labour Law — Employment — Dismissal — Respondent dismissed appellant from his employment — Trial court dismissed appellant's application for judicial review to quash decision of respondent — Whether appellant was denied right of appeal to Public Services Disciplinary Board — Whether appellant was denied right to oral hearing — Whether appellant not supplied with documents used against him

This was an appeal against the decision of the High Court in dismissing the appellant's application for judicial review to quash the decision of the respondent to dismiss him from the Malaysian Anti-Corruption Commission ('the MACC'). The appellant was dismissed by the respondent based on five charges ie: for being irresponsible and insubordination under the first, third, fourth and fifth charges and for conducting himself in such manner as to bring the public service into disrepute under the second charge. The appellant's grounds of appeal were that: (a) he was denied the right of appeal to the Public Services Disciplinary Board ('the board'); (b) he was denied the right to an oral hearing; and (c) he was not supplied with the documents and report which were used against him even though he had requested for them in his representation letter.

Held, dismissing the appeal with costs:

(1) The jurisdiction of the board in respect of staff falling under the managerial and professional group is limited to disciplinary action not with a view to dismissal or reduction in rank. Thus, if the disciplinary

action is one with a view to dismissal or reduction in rank, as in the present case, then the board was not seized with the jurisdiction. Consequently, the appellant was not eligible to lodge an appeal against the decision of the respondent to the board (see para 14).

(2) The charges against the appellant were clear and concise. The subject matter of the charges was related to: (a) 'Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No 1/2010, Arahan Pengarah Bahagian Operasi Khas' dated 14 January 2011 ('Arahan'); and (b) newspaper reports in the *Berita Harian* and *Utusan Malaysia* dated 21 September 2011 and 8 October 2011 ('the newspaper reports'). The newspaper reports were known to the appellant as the relevant extracts therefrom were reproduced in the second charge. The appellant's claim of ignorance of the 'Arahan' was of no avail because as an officer of the MACC, he was deemed to know the rules and regulations which govern him. The other documents related to the then on-going police investigation against the appellant were confidential papers which were not accessible to the appellant. Further, in his representation letter, the appellant had given detailed and comprehensive answers and explanations for all the five charges. Thus, the appellant was given a fair opportunity to correct or contradict the evidence and statements made affecting him (see paras 18 & 30).

(3) Based on the facts, the appellant did not dispute the facts which form the subject matter of the charges. Instead, he proffered his own interpretation of the regulations and directives in question. As such, the present case did not involve two sets of facts and documents. In the circumstances, the right of oral hearing was properly observed by the respondent (see paras 29–30).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak permohonan perayu untuk semakan semula bagi membatalkan keputusan responden untuk memecatnya daripada Suruhanjaya Pencegah Rasuah Malaysia ('SPRM'). Perayu telah dipecat oleh responden berdasarkan lima pertuduhan iaitu kerana tidak bertanggungjawab dan tidak mengikut arahan di bawah pertuduhan-pertuduhan pertama, ketiga, keempat dan kelima dan kerana diri sendiri berkelakuan dalam cara yang menjejaskan reputasi penjawat awam di bawah pertuduhan kedua. Alasan rayuan perayu adalah bahawa: (a) dia dinafikan hak untuk merayu kepada Lembaga Tatatertib Perkhidmatan Awam ('lembaga tersebut'); (b) dia dinafikan hak kepada perbicaraan lisan; dan (c) dia tidak diberikan dokumen dan laporan yang digunakan terhadapnya meskipun dia memohon untuknya dalam surat representasinya.

Diputuskan, menolak rayuan dengan kos:

(1) Bidang kuasa lembaga tersebut berkaitan pekerja yang terjatuh di bawah kumpulan pengurusan dan profesional terhad kepada tindakan tatatertib bukan untuk pemecatan atau penurunan pangkat. Oleh itu, jika tindakan tatatertib adalah satu untuk pemecatan atau penurunan pangkat, seperti dalam kes ini, maka lembaga tersebut tidak mempunyai bidang kuasa itu. Berikutan itu, perayu tidak layak untuk membuat rayuan terhadap keputusan responden kepada lembaga tersebut (lihat perenggan 14).

(2) Pertuduhan-pertuduhan terhadap perayu adalah jelas dan padat. Hal perkara pertuduhan-pertuduhan berkaitan dengan: (a) Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No 1/2010, Arahan Pengarah Bahagian Operasi Khas bertarikh 14 Januari 2011 ('Arahan'); dan (b) laporan akhbar dalam *Berita Harian* dan *Utusan Malaysia* bertarikh 21 September 2011 dan 8 Oktober 2011 ('laporan akhbar tersebut'). Laporan akhbar tersebut diketahui oleh perayu sebagai ekstrak relevan yang dikemukakan dalam pertuduhan kedua. Tuntutan tiada pengetahuan perayu tentang arahan tersebut tidak berjaya kerana sebagai pegawai SPRM, dia dianggap untuk mengetahui kaedah dan peraturan yang mengawalnya. Dokumen lain yang berkaitan dengan siasatan polis yang sedang dijalankan terhadap perayu merupakan dokumen sulit yang tidak boleh diberikan kepada perayu. Selanjutnya, dalam surat representasinya, perayu telah memberikan jawapan dan penjelasan terperinci dan komprehensif untuk kesemua lima pertuduhan. Oleh itu, perayu telah diberikan peluang adil untuk memperbetul atau menentang keterangan dan kenyataan yang dibuat yang menjejaskannya (lihat perenggan 18 & 30).

(3) Berdasarkan fakta, perayu tidak mempertikaikan fakta yang membentuk hal perkara pertuduhan-pertuduhan tersebut. Sebaliknya, dia membuat pentafsirannya sendiri tentang peraturan dan arahan yang dipersoalkan. Oleh itu, kes ini tidak melibatkan dua set fakta dan dokumen. Dalam keadaan berikut, hak untuk perbicaraan lisan wajar dipertimbangkan oleh responden (lihat perenggan 29–30).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 4 MLJ 1; [2010] 3 CLJ 643, FC (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (distd)
Chan Kwai Chun v Lembaga Kelayakan [2002] 5 MLJ 273, HC (refd)
Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)
Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor) [2006] 2 MLJ 343; [2006] 1 CLJ 88, HC (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)
Mat Ghaffar bin Baba v Ketua Polis Negara & Anor [2008] 2 MLJ 1; [2008] 1 CLJ 773, CA (refd)
Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor [2015] 2 MLJ 88, CA (distd)
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)
Tan Sri Dato' Sri Khalid bin Abu Bakar (DIG) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia & Ors v Muhammad Farid bin Muntalib [2015] 2 MLJ 783, CA (refd)
Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2005] 1 MLJ 320; [2012] 1 CLJ 448, HC (refd)

Legislation referred to

Federal Constitution arts 135(2), 144(5B)
Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(d), (2)(g), (2)(i), 37, 37(5)
Public Services Disciplinary Board Regulations 1993 regs 2(1), 3(1), 3(3), 10(a), 14, Schedule

Appeal from: Application for Judicial Review No 25–83–07 of 2014 (High Court, Pulau Pinang)

M Athimulan (K Rajo with him) (Athimulan & Co) for the appellant.
Maisarah Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal is against the decision of the High Court dismissing the appellant's application for judicial review to quash the decision of the respondent, the Public Services Commission ('PSC') to dismiss him from the Malaysian Anti-Corruption Commission.

THE SALIENT FACTS

[2] The appellant was an investigating officer Grade P44 of the Malaysian Anti-Corruption Commission ('MACC'). On 6 August 2012, the secretary of the PSC issued a show cause letter to the appellant. The appellant was informed that the PSC had received a report that the appellant had committed disciplinary offences for which disciplinary proceedings were taken against him under reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the POCD Regulations'). Consequently, the appellant was asked to show cause why he should not be dismissed or reduced in rank.

[3] By a letter dated 3 September 2012, the appellant submitted his representation to the PSC. The appellant denied all the five charges preferred against him and he provided explanations in respect of every charge. The appellant also asked for an oral hearing and for documents (including the report) to be supplied to him to enable him to prepare his defence.

[4] By a letter dated 12 February 2014 addressed to the appellant, the PSC informed the appellant that after they have considered the appellant's case, they have found the appellant guilty of the charges. Consequently, the PSC decided to dismiss the appellant from service effective from 27 January 2014.

SUBMISSION OF PARTIES

[5] The appellant's appeal is grounded on three main issues.

[6] First, he complains that he was denied the right of appeal to the Public Services Disciplinary Board ('the board'). Learned counsel for the appellant argued that the appellant had the constitutional right to appeal to an appeal board against the decision of the PSC under art 144(5B) of the Federal Constitution; and which appeal procedure is contained under regs 3(1) and 14 of the Public Services Disciplinary Board Regulations 1993 ('the DB Regulations').

[7] Second, he says that he was denied the right to an oral hearing. Learned

counsel also argued that pursuant to art 135(2) of the Federal Constitution, the appellant cannot be dismissed without being given a reasonable opportunity of being heard. The right to be heard is fortified by reg 10(a) of the DB Regulations. Whilst conceding that the appellant is not entitled to an oral hearing as of right, learned counsel argued that on the facts and circumstances of this case, an oral hearing ought to have been given. One, even though the appellant had asked for an oral hearing, the PSC did not respond to his request. Two, the appellant did not plead guilty or admit to the charges in his representation letter. Three, the appellant had given an explanation for each and every charge and disputed the contested facts. Four, there are two sets of facts and documents before the PSC. And lastly, the appellant had asked for the documents and report to be supplied. In support of his argument, learned counsel referred to two Federal Court decisions in *Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2005] 1 MLJ 320; [2012] 1 CLJ 448 and *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577.

[8] Thirdly, he was not supplied with the documents and report which were used against him even though he had requested for them in his representation letter. Learned counsel argued that the PSC had failed to observe the rules of natural justice and fairness by their refusal to provide the said documents (*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC); *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor)* [2006] 2 MLJ 343; [2006] 1 CLJ 88).

[9] In reply, learned senior federal counsel ('SFC') argued that reg 14 of the DB Regulations should not be read in isolation because it refers to sub-reg 2(1). Cross-reference must be made to sub-reg 2(1) in order to ascertain whether the appellant is eligible to appeal to the board. The appellant is a Grade P44 officer and as such is considered as belonging to the Managerial and Professional Group. Regulation 14 of the DB Regulations will only operate if the decision made by PSC is within the Schedule referred to in sub-reg 2(1). Column 3 of the Schedule provides that the DB would only have jurisdiction in respect of managerial and professional group officers if the disciplinary action is not with a view to dismissal or reduction in rank.

[10] On the second ground, learned SFC argued that the show cause letter contained the five charges and the grounds for the dismissal or reduction in rank. The appellant was given 21 days to put in his written representation. As such there has been no procedural unfairness leading to the dismissal as the appellant had been given a reasonably opportunity of being heard and to state his case on the charges (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777 (FC)). At any rate, the right to be heard does not mean the right to be heard orally. What it means is that the

officer concerned should be given a full opportunity of stating his case (*Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333 (SC)). Further, reg 37(5) of the POCD Regulations provides that if the disciplinary authority is of the opinion that the case against the officer requires further clarification, the disciplinary authority may establish an investigating committee for the purpose of obtaining further clarification. The decision whether to establish an investigation committee is at the discretion of the disciplinary authority on a consideration of the representation letter; and that it is a decision of the disciplinary authority and not the officer or the court (*Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573 (FC); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525 (FC); *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577 (FC)).

[11] In reply to the third ground, learned SFC argued that the documents requested by the appellant were the documents considered by the PSC in deciding that there was a prima facie case for the appellant to be charged on the five counts. The secretary to the PSC had affirmed in his affidavit (*RR* at pp 60–62) that the documents and the report requested by the appellant have been classified as confidential documents.

[12] However, the right to the documents will only arise if the documents referred to are prejudicial to the appellant. Learned SFC distinguished *Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor* [2015] 2 MLJ 88 (CA) where the Court of Appeal held that there was a breach of natural justice in the non-supply of a material document to the appellant in that case. In the present case, the appellant was charged for irresponsibly conducting himself in such a manner as to bring the public service into disrepute; for irresponsible and insubordinate conduct under reg 4(2)(d), (g) and (i) of the POCD regulations. As such, the subject matter of the charges are basically in respect of Perintah Tetap Ketua Pesuruhjaya SPRM Bab F (Perisikan) No 1/2010, Arahan Pengarah Bahagian Operasi Khas dated 14 January 2011 and the newspaper reports from *Berita Harian* and *Utusan Malaysia* dated 21 September 2011 and 8 October 2011 respectively. All these documents were referred to in the charges and are within the knowledge of the appellant. The appellant did not show which document or part of the documents in question in the show cause letter is prejudicial to him. At any rate, the appellant was able to answer to all the five charges in his representation letter. Further, the appellant's claim that he had no knowledge of Arahan Pengarah Bahagian Operasi Khas dated 14 January 2011 is no excuse as he is deemed to know the rules and regulations governing him (*Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1; [2010]

3 CLJ 643 (FC)). Further, the documents are privileged documents as they were part of the police investigation papers which led to the appellant being arrested, detained and charged in court (*Chan Kwai Chun v Lembaga Kelayakan* [2002] 5 MLJ 273; *Tan Sri Dato' Sri Khalid bin Abu Bakar (DIG) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia & Ors v Muhammad Farid bin Muntalib* [2015] 2 MLJ 783 (CA)).

DECISION

[13] In the first place, it must be noted that the DB is a body established under sub-reg 2(1) of the DB Regulations. Subregulation 3(1) thereof stipulates that the jurisdiction of the DB relates to the conduct and discipline of officers under the Managerial and Professional Group. Subregulation 3(3) further provides that the DB shall have jurisdiction as specified in column 3 of the Schedule. Column 3 of the Schedule refers to 'Disciplinary action not with a view to dismissal or reduction in rank'.

[14] In other words, the jurisdiction of the DB in respect of staff falling under the Managerial and Professional Group is limited to disciplinary action *not* with a view to dismissal or reduction in rank. It follows that if the disciplinary action is one with a view to dismissal or reduction in rank, as in the present case, then the DB is not seized with the jurisdiction. Consequently, the appellant is not eligible to lodge an appeal against the decision of the PSC to the DB. The appellant's argument that he has been denied his right of appeal is misconceived in law and in fact and is without merit. There was no misdirection by the learned judge in this regard.

[15] The second and third grounds relate to a denial of natural justice and will be dealt with together. The principles relating to the supply of documents at the appellant's request are quite settled. In *B Surinder Singh Kanda* the report of the Board of Inquiry contained a severe condemnation of Inspector Kanda. It was sent to the adjudicating officer before he sat to enquire into the charge. He read it and had full knowledge of its contents. Inspector Kanda never had it and had no opportunity of dealing with it; as such he complained that he was denied the right to be heard. On those facts, the Privy Council found that there was a failure to afford Inspector Kanda a reasonable opportunity of being heard in answer to the charges preferred against him and which resulted in his dismissal; and that such failure amounted to a denial of natural justice. Lord Denning delivering the opinion of the Privy Council said at p 172:

> In the opinion of Their Lordships, however, the proper approach is somewhat different. The rule against bias is another thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put it in two maxims: *Nemo judex in causa sua*: and *Audi alteram partem*. They have recently been put in

A the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

B If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. ... It follows, of course, that the judge or whoever has to adjudicate must not C hear evidence or receive representations from one side behind the back of the other.

[16] In *Mohd Zulhazi Mohd Zulkafli* disciplinary proceedings were instituted against the appellant who was a police officer in respect of three charges of disciplinary offence. The first charge alleged him of having received D a bribe from one Alex to desist from taking criminal action against the said Alex. Alex had made a statement to the Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') implicating the appellant. The appellant was found guilty on all three charges and dismissed. His complaint was that he was not supplied with the statement made by Alex for the purpose of making his representation E in response to the first charge. The Court of Appeal held that in order for the appellant to prepare an effective defence against this charge he needed to have sight of the allegation made against him and to have the opportunity to rebut each and every statement that might implicate him in the offence. As such, the Court of Appeal found that there was a breach of natural justice and allowed F the appeal.

[17] In essence, the general principles on this issue may be summarised as follows:

G (a) concomitant with the right to be heard is the right of a person to know the case made against him;

(b) he must know what evidence has been given and what statements have been made affecting him; and

H (c) he must be given a fair opportunity to correct or contradict them.

[18] We have considered the arguments of the appellant and perused the appeal record. We agree with the submission of learned SFC that *Kanda* and *Mohd Zulhazi Mohd Zulkafli* are distinguishable on the facts. In *Kanda*, the I adjudicating officer acted on a Report of the Board of Inquiry which contained a severe condemnation of Inspector Kanda; and in *Mohd Zulhazi Mohd Zulkafli*, the disciplinary authority had relied on the complainant's (Alex's) statement which implicated the appellant with the offence of bribing. The nature of both documents in question is quite similar in that both documents

were prejudicial to the appellants. Both documents had the effect of condemning and incriminating the appellants with the disciplinary offences for which they were charged. In the instant appeal, however, the charges against the appellant are clear and concise. The appellant was charged for being irresponsible and insubordinate under reg 4(2)(g) and (i) of the POCD Regulations under the first, third, fourth and fifth charges and for conducting himself in such a manner as to bring the public service into disrepute under reg 4(2)(d) under the second charge. We have perused the five charges in question and we agree that the subject matter of the charges relate to: (i) Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No 1/2010, Arahan Pengarah Bahagian Operasi Khas dated 14 January 2011; and (ii) newspaper reports in the *Berita Harian* and *Utusan Malaysia* dated 21 September 2011 and 8 October 2011. The newspaper articles in question are known to the appellant as the relevant extracts therefrom are reproduced in the second charge. The appellant's claim of ignorance of the Arahan Pengarah Bahagian Operasi Khas dated 14 January 2011 is of no avail because as an officer of the MACC he is deemed to know the rules and regulations which govern him (*Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor*). The other documents relate to the then on-going police investigations against the appellant and are confidential papers which are not accessible to the appellant. We have also perused the appellant's representation letter; we note that he has given detailed and comprehensive answers and explanations for all the five charges. As such, we do not agree that he was not given a fair opportunity to correct or contradict them.

[19] We now address the complaint that the appellant was denied an oral hearing. In *Utra Badi* the Federal Court held that the right to be heard under art 135(2) of the Federal Constitution does not require that the public officer be given an oral hearing and that it could not be argued that the failure to give that public officer an oral hearing was a denial of justice. In *Vickneswary* the Federal Court held, inter alia, that: (i) from the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the public officer facing the disciplinary charge to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it; and (ii) it is not the court but the disciplinary authority which has to decide the question of whether the public officer had exculpated himself by his written representation.

[20] In *Yusof Sudin* the appellant a former police officer was dismissed from the police force after disciplinary proceedings were taken against him. He had made his representation denying all charges and had also furnished reasons in support of his denial. In his representation letter, he had asked for an oral hearing in the event his explanation was deemed insufficient to exculpate

himself from the charges against him. The first respondent (Police Service Commission) ignored his request and proceeded to consider his representation which resulted in his dismissal. He applied for a declaration that his dismissal was unlawful, unconstitutional, void and of no effect. The High Court dismissed his claim and it was affirmed by the Court of Appeal. The question of law before the Federal Court was whether the principle in *Utra Badi* and *Vickneswary* which state that 'the right to be heard under art 135(2) of the Federal Constitution do not require the person concerned to be given an oral hearing' applies to all cases or whether there are exceptions to this general rule.

[21] The majority decision of the Federal Court departed from *Utra Badi* and *Vickneswary* and allowed the appeal. In his judgment, Richard Malanjum CJ (Sabah and Sarawak) held that where there is a request by a public officer for an oral hearing after he had denied all the charges then he should be given an oral hearing to satisfy the requirements of art 135(2) of the Federal Constitution. Zulkefli Makinudin FCJ (as he then was) the other member of the panel said that the principle in *Utra Badi*'s case is a general principle and restricted on its own facts. It does not cover situations where the officer in his representation letter gave exculpatory statement and made a special request for an oral hearing. The court is in a position to review and extend the general principle in *Utra Badi* by stating the exception to this general rule. When there is a request by the public officer for an oral hearing after he had denied all the charges and appeared to have exculpated himself by furnishing credible evidence in his representation letter, the officer should be afforded an oral hearing to satisfy the requirements of art 135(2) of the Federal Constitution. It would become all the more necessary for the oral hearing to be held if there was no evidence to contradict the public officer's exculpatory statement. Further, the charges framed against the appellant appeared general in nature and lacked in particulars. It would have been more appropriate for the disciplinary authority to initially determine whether in light of the representation made by the appellant, an oral hearing was warranted. The Federal Court found that the disciplinary authority had failed to do so. As such, the appellant ought to have been given an oral hearing as requested to enable him to make an effective and meaningful defence to the charges.

[22] In *Tay Chai Huat* the inspector was dismissed from the Royal Malaysian Police after the disciplinary authority found his written representation in response to a show cause letter on five charges failed to show sufficient cause. The inspector did not at any stage request for an oral hearing. Before the Federal Court, the question of law was whether the opinion of the disciplinary authority that the case against the officer does not require further clarification is subject to a review or scrutiny by the courts. The Federal Court held that the disciplinary board should not be faulted for failing to conduct an oral hearing.

Mohd Ghazali Yusof FCJ (Hashim Yusof FCJ concurring) held that the opinion of the disciplinary authority that the case against a public officer did not require further clarification was not subject to review or scrutiny by the court. An oral hearing may be given in instances where the disciplinary authority considered the case against the officer required further clarification. If it considered no further clarification was required, the officer concerned could not insist or demand that a committee of inquiry be appointed. Arifin Zakaria CJ in answering the question of law in the negative allowed the appeal on the narrow ground that there was no request from the public officer concerned for the appointment of a Committee of Inquiry under the General Orders. In his judgment, His Lordship referring to *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 1 CLJ 773 and *Yusof Sudin* said at p 155 (MLJ); p 585 (CLJ):

> In both these cases, it was held that in the circumstances of the case, an oral hearing ought to have been granted. The above authorities affirmed that if the right to be heard under art 135(2) is to have a real meaning, *the circumstances of each case must be fully considered before the court could come to the conclusion whether or not such right has been properly observed by the disciplinary authority* (see also *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169). (Emphasis added.)

[23] In our view, the key principles distilled from the aforesaid decisions of the apex court may be briefly stated as follows.

(a) the right to be heard does not mean the right to be heard orally. What it means is that the public officer concerned should be given a full opportunity of stating his case;

(b) an oral hearing may be given in instances where the disciplinary authority considers that the case against the public officer requires further clarification;

(c) where there is a request by the public officer for an oral hearing after he has denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, the officer should be afforded an oral hearing;

(d) an oral hearing should be granted when there is a request and when the disciplinary authority is faced with two sets of facts, documents and evidence; and

(e) all the circumstances of each case must be fully considered before the court could come to the conclusion whether or not the right to an oral hearing has been properly observed by the disciplinary authority.

[24] Applying the principles aforesaid, it is necessary for us to consider the

circumstances according to the facts as disclosed in the affidavit evidence. In respect of the first charge, the appellant did not deny the fact that he received information involving the smuggling of monies involving foreign money changers. He admitted to examining declaration forms and forex transaction receipts of certain individuals. He did not deny the charge of failing to report his actions to the Pengarah Bahagian Operasi Khas SPRM; instead, he proffered reasons and excuses for his omission and claimed ignorance of Arahan Pengarah Bahagian Operasi Khas dated 14 January 2011.

[25] In respect of the second charge, the appellant explained that on 21 September 2011, he was under police remand. He blamed the media for distorting the facts. He said that the '3 pegawai kanan SPRM ditahan, suspek didakwa samun RM900,000 milik pengurup wang' is incorrect because he was the only senior officer whereas the other two were junior officers Grade P29. He took umbrage at the *Utusan Malaysia* report which referred to them as 'tiga pegawai risik SPRM' when in fact they were not *pegawai risik*. He also said that the media reports were hearsay and without factual basis.

[26] The third charge alleged that the appellant allowed his source one Sritharan to be present at the investigation in breach of Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No 1/2010. In his representation letter, the appellant justified his conduct on the ground that only the source could identify the moneychangers and customs officers involved in the smuggling of foreign exchange.

[27] On the fourth charge, the appellant was alleged to have failed to submit a report to his head of his department about the smuggling of foreign exchange and the involvement of the customs and police agencies and distribute it to the Jawatankuasa Menilai Maklumat (JMM) SPRM in breach of Perintah Tetap Ketua Persuruhjaya SPRM Bab F (Perisikan) No 1/2010. The appellant admitted that he had informed the head of his department about the forex smuggling activities and that he was instructed to prepare a report. He admitted that he did not prepare the report but instructed another officer one Aziz bin Jaafar to prepare the report. He also asserted that it was not his duty to send a copy of his report to the JMM SPRM.

[28] On the fifth charge, the appellant was charged with failing to refer the information received to the Pengarah Bahagian Operasi Khas for further action and thereby breached 'para 4.2.1 Arahan Timbalan Ketua Pesuruhjaya (Operasi) SPRM Bil 1/2011 bertarikh 02.03.2011 berkaitan Garis Panduan Tindakan Siasatan Bagi Kes-Kes Berprofil Tinggi'. In his reply, the appellant contended that he did not refer the information to the Pengarah because the information was not specific in that it did not identify the moneychanger, customs officer or police officer involved. According to his understanding, the

directive in question only required him to refer the information not only to the pengarah but could also be referred to the 'Pengarah SPRM Negeri, Ketua Cawangan Negeri atau Ketua Unit Siasatan Ibu Pejabat/SPRM Negeri'. At any rate, he said that he had referred the matter to the Ketua Cawangan Siasatan, Bahagian Operrasi Khas, SPRM and received instructions to obtain further information on the illegal activities. He also said that he tried to find the pengarah but the pengarah was not in his office. So, he went to see the Timbalan Pengarah Opersi Khas SPRM on 15 September 2011. The appellant also denied the charge that he should have followed the said Arahan Timbalan Pengarah Pesuruhjaya (Operasi) SPRM because at that time it could not be confirmed whether it was a high-profile case or not.

[29] It is patently clear from the above that what the appellant tried to do was to explain and justify his actions and omissions. He proffered his own interpretation and understanding of the regulations and directives in question. The appellant has not disputed the facts which form the subject matter of the charges. As such, this case does not involve two sets of facts and documents. We have carefully scrutinised the appeal record and are constrained to hold that the appellant has not exculpated himself by furnishing credible evidence in his representation letter. In all the circumstances, we are bound to hold that the appellant knew the charges which were made against him, the evidence which has been given and the statements affecting him. He had been given a fair opportunity to correct or contradict them. In short, the appellant had been given the full opportunity of stating his case.

CONCLUDING REMARKS

[30] In conclusion, we find that the disciplinary action to which the appellant was subjected to with a view to dismissal or reduction in rank is not one which is appealable under the DB Regulations. Secondly, for the reasons adverted to above we hold that the non-supply of the documents and the report did not deprive the appellant of his right to know the case against him. He knew of the evidence and statements made affecting him and have had a fair opportunity to correct or contradict them. Thirdly, the appellant did not really dispute the facts forming the subject matter of the charges. Instead, the appellant gave his own interpretation of the rules and directives and attempted to justify his actions. Having carefully considered the circumstances surrounding this case, we are of the view that the right to oral hearing was properly observed by the PSC.

[31] In consequence, we dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar